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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

ALMONT AMBULATORY
SURGERY CENTER, LLC, et al.,

Plaintiffs,

v.

UNITEDHEALTH GROUP
INCORPORATED, et al.,

Defendants.

And Related Counterclaim.

Case No. CV 14-03053 MWF (AFMx)

**MEMORANDUM OPINION AND
ORDER RE IMPERIUM AND
PRODUCTION OF DOCUMENTS
FROM THE NEXTECH
DATABASE**

This matter came before the undersigned Magistrate Judge on November 14, December 12, and December 19, 2017 for an evidentiary hearing. Counterclaim Plaintiffs (also known as “United”) were represented by Bryan S. Westerfeld, Timothy E. Branson, Michelle S. Grant, and Michael E. Rowe. Counterclaim Defendants (also known as “Providers”) were represented by Kamille Dean. Imperium Medical Services, Inc. was represented by Okorie Okorocha. Based on the pre-hearing briefs, the evidence presented at the hearing, and the proposed

1 findings of fact and conclusions of law submitted by the parties, the Court rules as
2 follows:

3 4 **I. FINDINGS OF FACT**

5 **A. Background of the Litigation**

6 1. On March 21, 2014, Plaintiffs initiated this action – as well as a related
7 state court action. The state court action was removed as Case No. 14-cv-2139
8 (“Main Action”).

9 2. On May 12, 2014, United brought a Counterclaim in this action,
10 alleging that Counterclaim Defendants conspired to defraud United and group
11 health plans it administers into paying fraudulent medical claims. Dkt. 15.

12 3. In September 2015, the Sheppard Mullin law firm moved to withdraw
13 from representing Plaintiffs/Counterclaim Defendants Julian and Michael Omid.
14 Dkt. 223. A few months later, the Hooper Lundy law firm moved to withdraw from
15 representing most of Counterclaim Defendants. Dkt. 270. After Plaintiffs failed to
16 secure new counsel by a deadline set by the District Judge, their affirmative case
17 against United was dismissed with prejudice. Dkt. 335.

18 **B. Background of Current Discovery Dispute**

19 4. On October 10, 2014, United served its first set of discovery, and the
20 Providers responded on December 10, 2014. Among the categories of documents
21 that United requested were patient medical and billing files for an identified set of
22 approximately 88 patients identified on Exhibit A to the requests. Dkt. 441-4.
23 Providers agreed to produce responsive information for the 15 United member
24 exemplars and for what they termed as the “overlap” patients; those patients that
25 were part of both Plaintiffs’ claims at the time as well as United’s Counterclaim.
26 Dkt. 441-5, Ex.15. On April 17, 2015, Providers produced several thousand pages
27 of documents relating to the 15 United member exemplars referenced in the
28 operative counterclaim at the time.

1 5. After failing to reach a resolution on the outstanding discovery
2 requests, United filed a motion to compel responses to its first set of discovery
3 requests on February 21, 2017. Dkt. 441. In response, Mark Jubelt, then counsel
4 for Counterclaim Defendants, filed a declaration stating that he was unable to locate
5 additional documents, but that he would “continue to attempt to find the relevant
6 documents to properly respond to the request for additional responses to the
7 discovery.” Dkt. 448.

8 6. On March 22, 2017, the Court granted United’s motion to compel.
9 Dkt. 462. The Court ordered Providers and their counsel “to promptly review and
10 produce all responsive documents and to prepare and serve substantive
11 interrogatory answers as sought by the motion.” *Id.* The Court also ordered the
12 parties to file a May 8, 2017, “joint status report regarding the progress that
13 Providers and their counsel have made in reviewing and producing documents and
14 providing answers to interrogatories.” *Id.* at 2.

15 7. Over the next several months, the parties filed two statements
16 regarding Providers’ progress with the Court order, and the parties held five
17 telephonic status conferences with the Court. Following the fourth status
18 conference, the Court ordered Providers to “either (1) serve and file a report
19 describing in detail how and when they will complete their production of ‘provider’
20 documents and when they will serve complete responses to the pending
21 interrogatories; or (2) serve and file a sworn declaration signed by their trial lead
22 counsel and a knowledgeable business representative of the parties that sets forth in
23 detail the facts as to why counterclaim defendants are unable to locate and produce
24 responsive documents . . . and why they are unable to provide complete responses
25 to the pending interrogatories.” Dkt. 501. Providers’ statement was due by
26 August 4, 2017.

27 8. The Providers failed to provide the required statement by August 14,
28 2017, and the Court issued a second order requiring that Providers file a similar

1 statement by August 21, 2017. Dkt. 503.

2 9. On August 21, 2017, Providers filed the required statement. Dkt. 504.
3 In it, they represented to the Court that they were going to print documents for
4 production from four places, including “documents contained in the Nextec (sic)
5 System.” Dkt. 504 at 2.

6 10. On September 1, 2017, United filed a response and requested
7 sanctions. Dkt. 516.

8 11. In opposition to United’s motion for sanctions, on October 7, 2017,
9 Providers stated for the first time that they were unable to comply with the Court’s
10 March 22, 2017 order compelling production of patient records because an
11 “unrelated nonparty entity,” Imperium Medical Services, Inc. (“Imperium”) held
12 the software license to an electronic medical records database called NexTech in
13 which the records were stored and that Imperium “refuses to generate documents or
14 ESI without compensation for labor and expenses.” Dkt. 544.

15 12. On October 17, 2017, the Court held a hearing at which it orally
16 granted in part United’s motion for sanctions. Dkt. 573. In a subsequent written
17 order, the Court found that in failing to comply with the previous order granting
18 United’s motion to compel, Providers had “set forth an unending set of excuses,
19 questionable representations, and broken promises to the Court.” *Id.* at 6.

20 13. Counsel for Providers and a litigation coordinator filed sworn
21 declarations asserting that Providers cannot – and do not have the ability to –
22 produce any additional documents because Counterclaim Defendant Surgery Center
23 Management, LLC (“SCM”) assigned the NexTech software license to Imperium.
24 Dkt. 557.

25 14. To address Providers’ assertions regarding ownership of the NexTech
26 software license and their access to documents in the NexTech system, the Court
27 scheduled an evidentiary hearing. Dkt. 573 at 8. The Court further ordered that in
28 advance of the hearing, the parties could conduct discovery regarding NexTech

1 issue. *Id.* The hearing took place on November 14 and December 12 and 19, 2017.

2 **C. Witnesses**

3 15. As summarized below, seven witnesses testified at the evidentiary
4 hearing.

5 • Brian Oxman

6 16. Mr. Oxman is currently the litigation coordinator for Golden State
7 Practice Management (“Golden State”). He has been in this position since the end
8 of 2015. Prior to and overlapping with that position, he was the litigation
9 coordinator for Counterclaim Defendant SCM from 2010 through 2016. Nov. 14,
10 2017 Tr. at 14:13-15:5.

11 17. Mr. Oxman was designated to testify as the corporate representative of
12 both Imperium and SCM in their 30(b)(6) depositions. Dkt. 614 at Exs. 7 and 13.

13 18. Mr. Oxman has coordinated litigation on behalf of Golden State and
14 SCM for each Counterclaim Defendant. Nov. 14, 2017 Tr. at 16:5-9.

15 19. As a litigation coordinator, Mr. Oxman also “dealt with Imperium
16 from the time of its incorporation in 2013, including its meetings of board of
17 directors, officers, shareholders; the creation of its documents; and the execution of
18 contracts which it signed with doctors and medical facilities.” Nov. 14, 2017 Tr. at
19 15:6-17; CCP Ex. 42.

20 20. Mr. Oxman was paid for his work by Golden State or SCM, or
21 sometimes by the attorneys, including current counsel for Counterclaim
22 Defendants. Nov. 14, 2017 Tr. at 16:19-17:14.

23 21. The Court finds that the testimony of Mr. Oxman was generally not
24 credible. In reaching this credibility determination, the Court relies on the
25 following:

- 26 (i) On direct examination, Mr. Oxman appeared helpful and
27 responsive to questions. On cross-examination, he became
28 defensive and argumentative.

- 1 (ii) Mr. Oxman’s testimony was contradicted on numerous
2 occasions by other witnesses, by documents and by his own
3 deposition.
- 4 (iii) During the first day of the hearing, Mr. Oxman answered a wide
5 variety of questions regarding Imperium and the Counterclaim
6 Defendants without hesitation and in lengthy answers. During
7 the second day of the hearing, Mr. Oxman attempted to deflect
8 questions on cross examination by stating that he had to review
9 documents before he could provide answers.
- 10 (iv) Significant aspects of Mr. Oxman’s testimony were based on
11 what he had been told by others or what he read in documents.
- 12 (v) The Court has reviewed Mr. Oxman’s pre-hearing deposition
13 testimony and found that he was evasive, unprofessional and
14 disruptive as a witness – at times raising his own objections (as
15 a witness) to questions.

16 22. The Court provides the following examples from the record in support
17 of its findings concerning Mr. Oxman’s credibility:

- 18 (i) Mr. Oxman testified that Janzen Hidalgo “often” said “no” to
19 discretionary access to NexTech system under ¶ 6 of the
20 Assignment and Assumption Agreement. Nov. 14, 2017 Tr. at
21 48. However, Janzen Hidalgo testified that he had not said no to
22 requests for discretionary access by doctors or staff. Dec. 19,
23 2017 Tr. at 51.
- 24 (ii) Mr. Oxman testified that Dr. Au said no to discretionary access
25 to NexTech system under ¶ 6 of the Assignment and
26 Assumption Agreement. Nov. 14, 2017 Tr. at 48. However,
27 Dr. Au testified that as CEO of Imperium, he did not have any
28 responsibilities with regard to NexTech license. He testified

1 that as CEO of Imperium, he was not involved in approving or
2 not approving others' use of NexTech. Nov. 14, 2017 Tr. at 83.
3 Dr. Au also testified that when he was CEO of Imperium no one
4 asked for prior medical records from when they were working at
5 Independent Medical Services ("IMS"). Nov. 14, 2017 Tr. at
6 97. Dr. Au further testified that he was not aware that the
7 NexTech license had been transferred from SCM to Imperium.
8 Nov. 14, 2017 Tr. at 98.

9 (iii) Mr. Oxman testified that Medical Investment Trust chose Janzen
10 Hidalgo to be President, CEO and sole Board Member of
11 Imperium. Nov. 14, 2017 Tr. at 50. However, Janzen Hidalgo
12 testified that lawyers who represented Counterclaim Defendants
13 asked him to become CEO of Imperium. The only
14 representative from the Medical Investment Trust who was
15 present at the board meeting was Janzen Hidalgo himself.
16 Dec. 19, 2017 Tr. at 16-17; Nov. 14, 2017 Tr. at 51.

17 (iv) Mr. Oxman testified that Dr. Au stepped down as CEO of
18 Imperium because he did not want to do that job anymore.
19 Nov. 14, 2017 Tr. at 52, 131. However, Dr. Au testified that
20 Counterclaim Defendants' lawyers asked him to resign. Nov. 14,
21 2017 Tr. at 87.

22 (v) Mr. Oxman testified that Maureen Jaroscak did not review CCD
23 Ex. 6 before it was sent out. Nov. 14, 2017 Tr. at 140. However,
24 Ms. Jaroscak testified that her practice would have been to
25 review the letter before it was sent, and she assumes that she
26 followed that practice regarding CCD Ex. 6. Dec. 12, 2017 Tr.
27 at 207-08.
28

- 1 (vi) Mr. Oxman testified that Ms. Jaroscak was not counsel for
2 Counterclaim Defendant SCM at the time she signed CCD Ex. 5
3 (the NexTech assignment) on behalf of Imperium. Nov. 14,
4 2017 Tr. at 175. However, Ms. Jaroscak testified she was an
5 attorney for SCM at the time she signed CCD Ex. 5 on behalf of
6 Imperium. Dec. 12, 2017 Tr. at 182. An appearance made by
7 Ms. Jaroscak for Surgery Center Management also contradicted
8 Mr. Oxman's testimony. Nov. 14, 2017 Tr. at 176.
9 Mr. Oxman's hearing testimony was also impeached by his
10 deposition testimony, where he stated that Ms. Jaroscak assisted
11 Surgery Center Management in connection with the NexTech
12 assignment. Nov. 14, 2017 Tr. at 177-78.
- 13 (vii) Mr. Oxman's testimony was contrary to CCD Ex. 6, when he
14 stated that counsel for Counterclaim Defendants were not the
15 authors of the document, even though their names are on the
16 signature line of the letter. Nov. 14, 2017 Tr. at 137-38.
- 17 (viii) Mr. Oxman testified that Julian Omidi was not part of the
18 administration of Surgery Center Management. Nov. 14, 2017
19 Tr. at 180. However, CCP Ex. 9 was signed by Julian Omidi in
20 the position of Surgery Center management administration.
21 Nov. 14, 2017 Tr. at 180.
- 22 (ix) Mr. Oxman testified extensively about the NexTech system and
23 claimed that it would take 3 to 4 hours to identify all
24 information about a single patient. Nov. 14, 2017 Tr. at 151.
25 However, Mr. Oxman has never used the system, has not run a
26 search on the system and has never seen a copy of patient notes.
27 He based his testimony about use of the NexTech system on
28 what others told him. Dec. 12, 2017 Tr. at 61.

- 1 (x) Mr. Oxman's testimony contradicts the sworn declaration of
2 former Imperium CEO Tim Kollars, regarding Mr. Kollars'
3 position. Nov. 14, 2017 Tr. at 192-95.
- 4 (xi) During cross-examination, Mr. Oxman repeatedly stated that he
5 needed to check documents before he could answer questions.
6 Dec. 12, 2017 Tr. at 16, 17, 23, 26, 33, 34, 38, 41, 46.
- 7 (xii) Mr. Oxman's testimony contradicts information in a settlement
8 agreement and license regarding the address of SCM. Dec. 12,
9 2017 Tr. at 42.
- 10 (xiii) Mr. Oxman's testimony regarding the burden of responding to
11 Counterclaim Plaintiffs' discovery was based on what others
12 told him. Dec. 12, 2017 Tr. at 63.
- 13 (xiv) Mr. Oxman testified that he met with Janzen Hidalgo at a
14 DoubleTree Hotel in Commerce, California, in October 2017, at
15 which time, Mr. Hidalgo told him that Counterclaim Defendants
16 could not use NexTech to respond to discovery. Dec. 12, 2017
17 Tr. at 63-64. However, Janzen Hidalgo testified that he had
18 never discussed with Mr. Oxman the conclusion that it would be
19 an unreasonable burden for Imperium to gather documents in
20 response to discovery in this case. Dec. 19, 2017 Tr. at 62-63.
- 21 (xv) Mr. Oxman testified about the materials put together by Brittany
22 Whitman – based on what others told him. Dec. 12, 2017 Tr. at
23 82-84.
- 24 (xvi) Examples of Mr. Oxman's misconduct at his deposition are
25 found at pages 11, 12, 13, 15, 16, 21, 27, 28-29, 30, 34, 37, 47,
26 53, 64-65, 69 and 81 of his deposition testimony on behalf of
27 SCM. *See* Dkt. No. 614-3 at 38-62.
28

1 • Maureen Jaroscak

2 23. Ms. Jaroscak is an attorney who represented Counterclaim Defendant
3 SCM and Golden State beginning in approximately February 2012. Dec. 12, 2017
4 Tr. at 149:17-25; 152:2-7. She continues to represent Golden State today. *Id.* at
5 165:5-15, 205:12-16.

6 24. Ms. Jaroscak has also represented Imperium, and has an ongoing
7 attorney-client relationship with Imperium. Dec. 12, 2017 Tr. at 205:9-11.
8 Ms. Jaroscak was Imperium's Manager or Chief Financial Officer, for a period of
9 time. CCP Ex. 5.

10 25. Ms. Jaroscak has represented Julian, Michael and Cindy Omid.
11 Dec. 12, 2017 Tr. at 205:17-22.

12 • Tim Kollars

13 26. Mr. Kollars served as CEO of Golden State from February 2014 to at
14 least January 2015. CCP Ex. 72, Kollars Decl. at ¶ 1. Prior to that, he was the
15 Chief Operating Officer of Golden State. CCP Ex. 68, Kollars Decl. at ¶ 1.

16 27. Mr. Kollars served as CEO of Imperium from 2014 to 2015. CCD
17 Ex. 15. Due to a recent medical condition, Mr. Kollars has severe memory issues
18 and is not able to recall much, if anything, regarding his role with either
19 Counterclaim Defendants or Imperium. Dec. 12, 2017 Tr. at 104:19-115:17. The
20 Court received into evidence a sworn declaration signed by Mr. Kollars in other
21 litigation. Dec. 12, 2017 Tr. at 113, 115-16.

22 • Dr. Lee Au

23 28. Dr. Au is a surgeon. On May 25, 2010, he signed an independent
24 contractor agreement with Counterclaim Defendant IMS to provide physician
25 services. CCP Ex. 2. Dr. Au also executed a contract with SCM to provide
26 services as a medical director to those surgery centers managed by SCM, including
27 many Counterclaim Defendants. CCP Ex. 3.

28 29. From 2015 to January 2017, Dr. Au served as the CEO of Imperium.

1 Nov. 14, 2017 Tr. 78:2-18. He replaced Timothy Kollars as CEO.

2 30. Dr. Au testified that attorneys asked him to become CEO, Secretary,
3 CFO, and Director of IMS. Nov. 14, 2017 Tr. at 61:22-24. The lawyers also asked
4 him to be CEO of Imperium. Nov. 14, 2017 Tr. at 80. He testified that the lawyers
5 would give him “instruction” when he was CEO of Imperium. Nov. 14, 2017 Tr. at
6 64:2-13.

7 31. He identified “the attorneys” as Maureen Jaroscak, Robert Rice,
8 Dmitriy Aristov, Mark Jubelt, and Ian Shakramy (all of whom have represented
9 Counterclaim Defendants). Nov. 14, 2017 Tr. at 62-63.

10 32. On or about September 8, 2017, Dr. Au was named CEO, Secretary,
11 CFO, and Director of IMS. CCP Ex. 1.

12 • Jamie Hidalgo

13 33. Jamie Hidalgo is the registered agent for service of process for
14 Imperium. CCP Ex. 4. Mr. Jamie Hidalgo also serves as the manager or corporate
15 representative for Counterclaim Defendants. Nov. 14, 2017 Tr. at 117:2-118:4;
16 CCP Exs. 28, 29, 34, 36, 37, 38 and 40.

17 • Janzen Hidalgo

18 34. Janzen Hidalgo (Jamie’s brother) is 24 years old. Dec. 19, 2017 Tr. at
19 9:7-8. He obtained a bachelor’s degree in nursing in 2015 and is a registered nurse
20 in the Philippines. Dec. 19, 2017 Tr. at 12:1-23. As his first job out of college,
21 Janzen Hidalgo worked for six months in the second half of 2016 at Royalty as an
22 assistant to an accountant. Dec. 19, 2017 Tr. at 13:3-20. Janzen Hidalgo has no
23 formal education in accounting or business. Dec. 19, 2017 Tr. at 18:20-19:1.

24 35. Janzen Hidalgo is the current CEO, Secretary, CFO, and sole Director
25 of Imperium. CCP Ex. 4. Janzen Hidalgo has served in this role since
26 approximately January 2017. Dec. 19, 2017 Tr. 16:13-15.

27 36. Janzen Hidalgo testified that Dr. Au and “a bunch of lawyers” asked
28 him to become Imperium’s CEO. Dec. 19, 2017 Tr. 17:3-18:7.

1 37. He identified “the lawyers” as Maureen Jaroscak, Robert Rice, Dmitriy
2 Aristov, Mark Jubelt, and Ian Shakramy.

3 38. Janzen Hidalgo is also the sole trustee of the Medical Investment
4 Trust, the 100% owner of Imperium. Dec. 19, 2017 Tr. at 28:21-29:5; CCD Ex. 26.

5 39. Janzen Hidalgo is an active-duty seaman with the United States Navy,
6 and is stationed in San Diego. Dec. 19, 2017 Tr. at 9:9-21.

7 • Ashkan Rajabi

8 40. Mr. Rajabi is the owner of Ashkan Tech, Inc. This business
9 specializes in IT consulting and computer repair. Dec. 19, 2017 Tr. 106:3-10.
10 Ashkan Tech has performed IT work for various Counterclaim Defendants,
11 including SCM and Top Surgeons. *Id.* Tr. 112:22-24; CCP Ex. 66.

12 **D. Imperium Medical Services, Inc.**

13 41. Imperium held its first Board of Directors meeting on February 15,
14 2014. Present at the meeting were Tim Kollars, Maureen Jaroscak, Brittney
15 Whitman, and Brian Oxman. CCD Ex. 15 at 1.

16 42. Brittney Whitman is an attorney who also represented Counterclaim
17 Defendants and assisted in the preparation of Plaintiffs’ Complaint in this action.
18 Nov. 14, 2017 Tr. at 156:6-7; Dec. 12, 2017 Tr. at 83:15-19.

19 43. At the February 15, 2014 meeting, Mr. Kollars was elected as the sole
20 member of the Board of Directors of Imperium, as well as its President, Secretary
21 and Treasurer. Maureen Jaroscak was elected as Assistant Secretary. CCD Ex. 15
22 at 2-3.

23 44. At the time he was elected as sole Director, President, Secretary and
24 Treasurer of Imperium, Mr. Kollars was also CEO of Golden State. CCP Ex. 72,
25 Kollars Decl. at ¶ 1.

26 45. The principal executive office of Imperium was “fixed” as 9107
27 Wilshire Boulevard, Suite 450, Beverly Hills, CA. CCD Ex. 15 at 5.

1 46. Mr. Kollars was the sole Director, President, Secretary and Treasurer
2 of Imperium until approximately August 2015. CCP Ex. 42.

3 47. Dr. Au succeeded Mr. Kollars. Dr. Au became the CEO, Secretary,
4 CFO, and sole Director of Imperium on August 1, 2015. Nov. 14, 2017 Tr. at
5 77:15-78:6; CCP Ex. 42. He served in each of these roles until sometime in 2017.
6 *Id.* at 79:2-5.

7 48. Dr. Au testified that one of the lawyers asked him to become CEO of
8 Imperium. Nov. 14, 2017 Tr. at 80:15-24. He could not recall which lawyer, but
9 identified the following individuals as “the lawyers” that he referred to: Richard
10 [Robert] Rice, Dmitriy Aristov, Mark Jubelt, Maureen Jaroscak, and Ian Shakramy.
11 *Id.*; 61:22-63:11.

12 49. According to Dr. Au, Imperium’s business is to manage Royalty
13 Surgery Center and Salus Medical. Nov. 14, 2017 Tr. at 85:6-9. Yet, Dr. Au, who
14 served as CEO of Imperium for approximately two years, could not identify what
15 Imperium does to manage Salus and Royalty. Nov. 14, 2017 Tr. at 85. He did not
16 know (i) if Imperium had a contract with Royalty or Salus, (ii) if he interacted with
17 anyone at Royalty or Salus as CEO of Imperium, and (iii) if Royalty or Salus paid
18 anything to Imperium for its management services. *Id.*

19 50. As CEO of Imperium, Dr. Au “answered to the lawyers.” Nov. 14,
20 2017 Tr. at 82:10-15; 60:9-63:11.

21 51. Imperium does not have any employees. Nov. 14, 2017 Tr. at 40:6-9.

22 52. Although he was CEO, Secretary, Treasurer, and Director of Imperium
23 for approximately two years, Dr. Au never saw a financial statement for Imperium
24 showing its revenues and expenses. He also never saw a tax return and was not
25 aware if it ever filed tax returns. Nov. 14, 2017 Tr. at 86:1-9. Dr. Au testified that
26 he supervised a bookkeeper. *Id.* at 113:2-4.

27 53. As CEO of Imperium, Dr. Au on rare occasions signed checks for
28 office supplies, such as paper clips and pencils. Nov. 14, 2017 Tr. at 115:10-116:1.

1 54. Dr. Au did not receive compensation for serving as CEO, Secretary,
2 Treasurer, or Director of Imperium. Nov. 14, 2017 Tr. at 86:22-87-1.

3 55. Mr. Oxman testified that Dr. Au decided to resign (Nov. 14, 2017 Tr.
4 at 87:9-24), but Dr. Au testified that several months ago, one of “the lawyers” asked
5 him to resign as CEO of Imperium. (*Id.* at 131:2-9).

6 56. Dr. Au is currently the CEO of Salus and the manager of Royalty.
7 Nov. 14, 2017 Tr. at 89:11-15; CCP Exs. 43, 44. Despite the fact that both of these
8 entities are currently managed by Imperium, Dr. Au could not recall any interaction
9 with Janzen Hidalgo in his role as CEO of Imperium other than brief greetings.
10 Nov. 14, 2017 Tr. at 89:11-23.

11 57. Dr. Au was replaced by Janzen Hidalgo in early 2017. CCP Ex. 4.

12 58. Janzen Hidalgo became the CEO of Imperium, as well as Secretary,
13 Treasurer, and sole Director in January 2017, although his official start date was in
14 March. Dec. 19, 2017 Tr. at 15:18-17:2.

15 59. Janzen Hidalgo is 24 years old and lacked qualifications to be a CEO,
16 secretary or treasurer of a business at the time he was named CEO, Secretary and
17 Treasurer of Imperium. Dec. 19, 2017 Tr. at 9:7-8; 12:1-23; 13:3-20; 18:20-19:1.

18 60. Janzen Hidalgo testified that during a meeting, Dr. Au and “a bunch of
19 lawyers” asked him to become CEO, Secretary, Treasurer, and Director of
20 Imperium. He was able to identify Maureen Jaroscak as one of “the lawyers” at
21 this meeting, but could not identify any others. Dec. 19, 2017 Tr. at 17:5-18:3.
22 Brian Oxman was also at the meeting. *Id.* at 19:21-23.

23 61. Dr. Au testified that he only knew Janzen Hidalgo by name and that he
24 did not know who chose Janzen Hidalgo to replace him as CEO of Imperium.
25 Nov. 14, 2017 Tr. at 88:4-15. Dr. Au did not recall meeting with Janzen Hidalgo to
26 assist him in the transfer of duties as CEO of Imperium. Nov. 14, 2017 Tr. at
27 88:24-89:1. He only recalled just greeting him briefly several times while in the
28 office or over the phone. *Id.* at 89:2-10.

1 62. Janzen Hidalgo testified that he was told his duties as CEO were “to go
2 through . . . the financial for the company and just see if we have a gain or a loss
3 each month, and that was basically it.” Dec. 19, 2017 Tr. at 18:13-19.

4 63. In June 2017, Janzen Hidalgo enlisted in the Navy. He lives on the
5 base in San Diego in the barracks. Dec. 19, 2017 Tr. at 9:9-21. On a typical
6 weekday, Janzen Hidalgo is on duty from 7 a.m. until after sunset. He also may
7 have duty on weekends in which he cannot get off the ship. Dec. 19, 2017 Tr. at
8 9:23-10:13.

9 64. To fulfill his duties as CEO, Secretary, Treasurer, and Director of
10 Imperium, Janzen Hidalgo goes to Imperium’s offices about once a month on a
11 Saturday. A manager provides him with a two-page financial report for Royalty
12 and Salus (not Imperium), which he reviews to determine if there was a gain or a
13 loss. If there was a loss, he discusses it with doctors and the other managers. He
14 has seen a loss only once and claims to have had a discussion about a loss with
15 Dr. Au. Dec. 19, 2017 Tr. at 73:5-20. Dr. Au, however, did not testify to such a
16 conversation. In performing his CEO duties, Janzen Hidalgo spends about 30-90
17 minutes in the office, once or twice per month. Dec. 19, 2017 Tr. at 20:13-23:6;
18 72:5-22.

19 65. Janzen Hidalgo has never signed any checks for Imperium. Dec. 19,
20 2017 Tr. at 51:17-19.

21 66. Janzen Hidalgo was not aware of any revenues or expenditures for
22 Imperium. Dec. 19, 2017 Tr. at 71:18-24.

23 67. Janzen Hidalgo does not know the value of Imperium’s asserts or
24 liabilities, if any. Dec. 19, 2017 Tr. at 75:3-8.

25 68. Although he is the sole director on the board of directors for Imperium,
26 Janzen Hidalgo has not reviewed Imperium’s bylaws or the minutes of any meeting
27 of the board of directors. Dec. 19, 2017 Tr. at 75:12-17. He also has not seen any
28 tax returns. Dec. 19, 2017 Tr. at 36:17-20.

1 69. Janzen Hidalgo is paid \$2,500 per month for his positions at Imperium.
2 His paychecks come from Royalty, not Imperium. Dec. 19, 2017 Tr. at 23:17-
3 25:23.

4 70. Based on the above evidence, the Court finds that Dr. Au and Janzen
5 Hidalgo were mere figureheads at Imperium, without actual, substantial
6 responsibilities. The Court further finds that Imperium had no other employees,
7 officers, or directors during that time period. Instead, to the extent that Imperium
8 has taken any actions while Dr. Au and Janzen Hidalgo held the positions of CEO,
9 secretary, treasurer and director, those actions were directed as instructed by “the
10 attorneys” who represent Counterclaim Defendants.

11 71. Jamie Hidalgo is currently the registered agent for Imperium. He is a
12 manager or representative of certain Counterclaim Defendants, although he could
13 not recall exactly which ones besides Beverly Hills SC, Bakersfield SC, SCM, and
14 Orange Grove SC. Nov. 14, 2017 Tr. at 117:2-118:14, 120:7-9. Sean Pezeshk, the
15 owner of SCM, asked Jamie Hidalgo to serve as the registered agent for Imperium
16 as well as certain Counterclaim Defendants. Nov. 14, 2017 Tr. at 26:11-16, 121:1-
17 11.

18 72. If he receives a document as registered agent for Imperium, Jamie
19 Hidalgo either contacts his brother Janzen Hidalgo or Kamille Dean and Maureen
20 Jaroscak. Nov. 14, 2017 Tr. at 122:12-23. In his position as manager for the
21 Counterclaim Defendants, he has contacted Kamille Dean and Maureen Jaroscak as
22 counsel for those companies. Nov. 14, 2017 Tr. at 123:2-7.

23 **E. NexTech Software License Agreement, Use of NexTech and**
24 **Assignment of the Software License Agreement**

25 73. On November 28, 2006 Counterclaim Defendant Julian Omid and
26 NexTech Systems, Inc. executed a software license agreement in which NexTech
27 granted Julian Omid a non-exclusive license to use the software (“NexTech
28 Software License Agreement:”). CCD Ex. 1.

1 74. The Counterclaim Defendants appeared to begin using NexTech
2 immediately following the execution of the NexTech Software License Agreement
3 by Julian Omidi in 2006. CCD Ex. 6.

4 75. Computers were used at each of the Surgery Centers to access
5 NexTech. Nov. 14, 2017 Tr. at 33:5-11.

6 76. NexTech could also be accessed via computer at the main office for
7 SCM, which was 9001 Wilshire Blvd. *Id.*

8 77. Each of the individual doctors could also remotely access NexTech.
9 *Id.* at 33:12-14.

10 78. On February 12, 2010, Counterclaim Defendant SCM was formed.
11 Ex. 12. On March 1, 2010, Julian Omidi purported to assign the NexTech license
12 to SCM. CCD Ex. 2. Charles Klasky signed the Assignment on behalf of SCM,
13 and Julian Omidi, who was “Administration” for SCM (CCP Ex. 9), signed for
14 himself. *Id.*

15 79. There is no evidence that SCM gave Julian Omidi any consideration
16 for the March 1, 2010 assignment, other than SCM stepping in his shoes with
17 regard to NexTech. CCD Ex. 2.

18 80. Section 8.5 of the NexTech Software License Agreement prohibits
19 transfers without NexTech’s affirmative consent. CCD Ex. 1. No evidence was
20 presented that NexTech consented to or approved the attempted March 1, 2010
21 assignment.

22 81. On March 14, 2012, SCM and non-party Golden State entered into a
23 “General Assignment and Novation,” by which SCM granted, assigned, transferred,
24 conveyed and delivered to Golden State “all of [SCM’s] duties, obligations, rights,
25 title and interest in and to all contracts and agreements between [SCM] and
26 Independent Medical Services, Inc.” CCD Ex. 3 at ¶ 1.

27 82. Paragraph 4 of the General Assignment and Novation states that it
28 “shall constitute a novation where Assignee shall assume all rights, liabilities,

1 debts, and other obligations of Assignor, and Assignor shall be released and forever
2 discharged from any debts, obligations, claim, causes of action, duties, or other
3 demands upon it to perform any of the ‘property’ which is transferred under this
4 General Assignment and Novation.” Mr. Oxman initially testified that through the
5 General Assignment and Novation, SCM assigned to Golden State “all contracts of
6 which it was a party to Golden State..., including the Nextech contract, whatever
7 rights it had to the Nextech contract.” Nov. 14, 2017 Tr. at 25:2-9.

8 83. There is no evidence that this assignment was presented to NexTech,
9 or that NexTech consented to this assignment.

10 84. When asked if the contracts assigned to Golden State in CCD Ex. 3
11 included all of SCM’s contracts with surgery centers, Mr. Oxman stated that he
12 would have to look at documents to see what was included in the assignment.
13 Dec. 12, 2017 Tr. at 33:8-22. Mr. Oxman also testified that Golden State did not
14 take over management of the surgery centers after execution of CCD Ex. 3. *Id.*

15 85. According to Mr. Oxman, there were two reasons why Imperium,
16 Royalty Surgical Center, LLC (“Royalty”), Salus Medical Services, Inc. (“Salus”) and additional surgery centers were created in 2013. First, Imperium, Royalty,
17 Salus, and eight other surgery centers were created in late 2013 as part a desire of a
18 small group of physicians, including Drs. Au and Michael Omid, “to split off and
19 form their own group.” Nov. 14, 2017 Tr. at 37: 6-7. Second, Mr. Oxman testified
20 that Imperium was created because SCM and NexTech were having a dispute over
21 the NexTech Software License Agreement, with NexTech complaining there were
22 too many users. Nov. 14, 2017 Tr. at 31:16-19. Mr. Oxman testified that the
23 solution to this dispute between SCM and NexTech was to create the new entity
24 Imperium. *Id.*

25 86. On the other hand, a July 19, 2013 declaration Mr. Kollars submitted
26 in connection with the divorce of Dr. Au, notes that the companies with which
27 Dr. Au was affiliated were in serious decline. Mr. Kollars declared, “I am Chief
28

1 Executive Officer of Golden State Practice Management. . . . Golden State Practice
2 Management provides management services for the New Life Surgery Centers and
3 oversight for the Independent Medical Services (IMS) companies which ‘employ’
4 Dr. Lee Au as an independent contractor. Dr. Lee Au is currently contracted with
5 the IMS organization and he provides medical services to patients affiliated with
6 the New Life Surgery Centers (NLSC).” CCP Ex. 110 at ¶¶ 1-2.

7 87. Mr. Kollars also stated in his declaration, “Our companies have lost
8 substantial revenue in recent years. In fact, we are not earning the majority of our
9 prior surgical income.” *Id.* at ¶ 3. Mr. Kollars also said, “Our loss of revenue
10 seems to be because of the following reasons: (1) The economic condition of
11 California has created an environment wherein people do not spend money on
12 things that are not necessary such as various plastic surgery procedures and other
13 operations of this type, (2) A majority of our revenue reductions are the result of a
14 public image campaign that tarnished the NLSC community image.” *Id.* at ¶ 4.
15 Mr. Kollars further stated, “As a result, the NLSC has lost substantial gross
16 revenue. These losses started in 2011, increased losses occurred in 2012, and the
17 losses have been the greatest in 2013. Consequently, our capital budget has been
18 put on hold, our operating budget has been substantially reduced, and we have
19 reduced staffing by 50% or more.” *Id.* at ¶ 5.

20 88. The new entities were intending to go into business at existing
21 locations of the surgery centers. *See* CCP Ex. 6. Mr. Oxman confirmed that the
22 listed addresses of the newly-created entities were the same addresses as the
23 existing Counterclaim Defendants surgery centers. Nov. 14, 2017 Tr. at 182:19-
24 183:3.

25 89. Similarly, the newly created management company, Imperium (which
26 was purportedly going to manage Royalty, the other surgery centers, and Salus)
27 listed 9100 Wilshire Blvd., Suite 800 East, Beverly Hills, CA as its primary
28 practice address in a federal National Provider Identifier (“NPI”) registry (CCP Ex.

1 5). This is the same address utilized by the management companies (SCM and
2 Golden State) for the Counterclaim Defendant surgery centers.

3 90. When asked if Salus and Royalty took over the practice of IMS,
4 Dr. Au answered: “I’m not sure if you could say that. Certainly – certainly I guess
5 it could look that way.” Nov. 14, 2017 Tr. at 89:24-90:2. He noted that there were
6 “certainly some similar things...[l]ike the office location and the staff.” Nov. 14,
7 2017 Tr. at 90:3-10.

8 91. With regard to the purported dispute between NexTech and SCM
9 regarding the NexTech Software License Agreement, Mr. Oxman did not specify
10 when the discussions occurred, only that they continued into May 2014. Nov. 14,
11 2017 Tr. at 22:6-14. Ms. Jaroscak testified that she was not aware of any
12 discussions between SCM and NexTech regarding assignment issues prior to 2014.
13 Dec. 12, 2017 Tr. at 187:12-188:8. Ms. Jaroscak also testified that Mr. Rajabi had
14 discussions with NexTech about problems with the license, in 2014. *Id.* at 187:8-
15 20.

16 92. On May 1, 2014, SCM purportedly transferred the NexTech Software
17 License Agreement to Imperium, CCD Ex. 5, although NexTech had not consented
18 to the March 1, 2010 assignment between Julian Omid and SCM.

19 93. The May 2014 assignment was signed by Charles Klasky as Manager
20 for SCM and Maureen Jaroscak as Manager for Imperium. CCD Ex. 5.

21 94. Ms. Jaroscak drafted the May 2014 Assignment and advised parties on
22 both sides of the Assignment transaction. At that time, she was acting as a manager
23 for Imperium, as lawyer for SCM and as a lawyer for Imperium. Dec. 12, 2017 Tr.
24 at 182:3-185:20. Even though she was a manager of Imperium, Ms. Jaroscak
25 explained the Assignment to SCM in her role as its lawyer. *Id.* at 185:9-15.
26 Similarly, the other outside counsel involved with the transaction – Sheppard
27 Mullin – reviewed the agreement on behalf of SCM’s interest, but also had an
28 attorney-client relationship with Imperium. Dec. 12, 2017 Tr. at 209:9-11.

1 95. On May 22, 2014, NexTech signed a Notice and Consent to
2 Assignment, which states:

3 NexTech System, Inc., the undersigned, hereby acknowledges receipt
4 of the Assignment dated May 1, 2014, by and between Surgery Center
5 Management, LLC. and Imperium Medical Services, LLC. NexTech
6 Systems, Inc., acknowledges that by this Assignment, Julian Omid has
7 assigned the NexTech Software License Agreement dated November
8 29, 2006, to Surgery Center Management, LLC., which has in turn
9 assigned the License to Imperium Medical Services, LLC. NexTech
10 Systems, Inc., hereby consents to and approves the Assignment, and
11 NexTech Systems, Inc., agrees to faithfully execute, perform, and
12 carry out all of the terms, conditions, and provisions of the NexTech
13 Software License Agreement with the new Assignee Imperium
14 Medical Services, LLC., in return for Imperium Medical Services,
15 LLC., agreeing to be bound by and faithfully execute, perform, and
16 carry out all the terms, provisions, and conditions of that Agreement
17 pursuant to the Assignment. NexTech Systems, Inc., hereby releases
18 Julian Omid from further obligations to perform under the terms of
19 the NexTech Software License Agreement dated November 29, 2006.

20 CCD Ex. 4.

21 96. Under Section 8.5 of the NexTech license, the assignment of the
22 license agreement to Imperium did not become effective until NexTech signed the
23 consent on May 22, 2014. CCD Ex. 1 at 5; CCD Ex. 4.

24 97. May 22, 2014 was two months after Plaintiffs filed their Complaints in
25 this action and the Main Action and ten days after United filed its Counterclaim in
26 this action.

27 98. On June 4, 2014, federal agents executed search and seizure warrants
28 against certain Counterclaim Defendants, and other related entities and individuals.
Dkt. 122 at 4.

 99. There is also an Assignment and Assumption Agreement dated as of
July 1, 2014, with SCM and Golden State the listed Assignors, and Imperium the
purported Assignee. This Assignment and Assumption Agreement is signed by
(1) Shawn Pezeshk – the owner of Golden State – on behalf of Golden State,

1 (2) Tim Kollars – who was the CEO of both Assignor Golden State and Assignee
2 Imperium at the time – on behalf of Imperium, and (3) Charles Klasky, on behalf of
3 SCM. The signatures are neither dated nor notarized, but the Assignment and
4 Assumption Agreement states that “IN WITNESS WHEREOF, Assignors and
5 Assignee have executed this Assignment as of the date first set forth above.”

6 100. The July 1, 2014 Assignment and Assumption Agreement asserts that
7 SCM and Golden State are the “owners and operators of [] records, books, papers,
8 files and documents” that they are purportedly assigning to Imperium.

9 101. Under the July 1, 2014 Assignment and Assumption Agreement, SCM
10 and Golden State (the “Assignors”) purportedly assigned to Imperium (the
11 “Assignee”): (i) all rights titles, interest, licenses, or right of use of the NexTech
12 Software System; (ii) all records, papers, materials, computer files, electronically
13 stored information, patient information, patient records, management materials,
14 books, papers, accounting systems and information, license agreements; and (iii) all
15 materials seized by the state, local, and federal government on June 4, 2014 from
16 SCM, Golden State, or any of its clients, managed entities, managed surgery
17 centers, managed physicians groups contract, or other party with whom they had
18 contracted. CCD Ex. 8 at Section 1.

19 102. Sections 5-7 of the July 1, 2014 Assignment and Assumption
20 Agreement purportedly govern SCM’s access to NexTech:

21 5. Continuity of Patient Care. Assignors hereby covenants and
22 agrees that it shall provide patient continuity of medical services,
23 record keeping, medical record history, and management of treatment
24 services which Assignors previously provided for individual patients
25 under its management arrangements with doctors, physicians, nurses,
26 surgical facilities, and other medical practitioners. Assignors shall be
27 obligated to assist any patient who is in need of finding a medical
28 doctor, nurse practitioner, or surgical facility whose records Assignors
shall obtained under this Assignment. Assignors shall provide any
patient upon reasonable request with a copy of their medical records

1 whenever such patient shall request copies of such records in the
2 manner provided by law.

3 6. Discretionary Access. Assignee may within its sole discretion
4 permit Assignors, or any of its agents or representatives, to have access
5 to the NexTech system for the purpose of conducting any patient
6 reviews, services, billings, or to assist Assignors in such uses of the
7 system as Assignee may deem advisable. Such access shall be limited
8 to those persons who are approved by Assignee within its sole
9 discretion. Such access may not include copying, printing, transferring,
10 duplicating, removing, altering, destroying, changing, or concealing
11 any information contained in the system, and such access may not
include providing any information contained in the system to any third
party for any purpose. Assignee may revoke such permission at any
time for any reason within its unlimited and sole discretion, including
any costs or burdens resulting from such access.

12 7. Third Party Requests. Should Assignors receive any request,
13 legal process, or subpoena by any third party for records, documents,
14 or materials assigned under this Agreement, Assignors shall instruct
15 such third parties that it will be necessary to subpoena Assignee for
16 such documents. Assignee will not comply with requests from third
parties for documents, records, or materials transferred under this
Agreement unless made pursuant to subpoena to Assignee.

17 103. Together, Sections 5-7 of the July 1, 2014 Assignment and
18 Assumption Agreement provide that (i) SCM and Golden State maintained access
19 to respond to patient requests and (ii) Imperium may provide access to SCM and
20 Golden State for patient reviews, services, billings, or other tasks Imperium deems
21 advisable. However, the Assignment and Assumption Agreement did not allow for
22 access to respond to third-party requests or in litigation other than by subpoena to
23 Imperium. *Id.*

24 104. No monetary consideration was given for the July 1, 2014 Assignment
25 and Assumption Agreement. CCD Ex. 8 at Section 8. Rather, Imperium assumed
26 certain of SCM's physician contracts and the supposed maintenance of NexTech.
27 *Id.*
28

1 105. Mr. Oxman testified that the July 1, 2014 assignment was entered into
2 because it was unclear at the time who had the right to get the materials back from
3 the government after the seizure. Nov. 14, 2017 Tr. at 43:22-44:18. The
4 Assignment and Assumption Agreement was executed, according to Mr. Oxman, to
5 make clear that Imperium would own all the materials, and that the individual
6 surgery centers and SCM could request return of materials in their name, in the
7 name of Golden State, or in the name of Imperium. *Id.* at 44:19-24.

8 106. On April 24, 2015 Maureen Jaroscak sent a letter to NexTech
9 regarding the “Status of Account with Golden State Practice Management, et al.”
10 CCD Ex. 6. The letterhead lists both Maureen Jaroscak and Dmitriy Aristov. *Id.*
11 The letter is not signed, but ends “Regards, Maureen Jaroscak.” *Id.* The letter
12 states, “I represent Imperium, formerly Surgery Center Management (SCM)....”
13 *Id.* It further refers to “Imperium/SCM” as utilizing Nextech since 2006. *Id.*
14 Mr. Oxman testified that this letter was a mistake by Mr. Aristov, noting that the
15 statements were “grandiose” and inaccurate and to his knowledge Ms. Jaroscak did
16 not review the letter before it was sent. Nov. 14, 2017 Tr. at 138:8-140:15.
17 However, Ms. Jaroscak testified that her normal practice was to review letters that
18 were sent out over her signature before they went out and she assumed she did so
19 with this letter as well. Dec. 12, 2017 Tr. at 207:20-208:9.

20 107. There was no evidence that Dr. Au (CEO of Imperium from August
21 2015 to January 2017) was aware of the Assignment and Assumption Agreement.
22 Dr. Au testified that he was not involved in granting any approvals as to who could
23 use NexTech, and does not know who would have. Nov. 14, 2017 Tr. at 97:6-10.

24 108. SCM, which received discovery requests seeking patient records in
25 October 2014, did not raise the existence of the May 22, 2014 Assignment or the
26 July 1, 2014 Assignment and Assumption Agreement as an impediment to the
27 production of documents until the late fall of 2017.
28

1 **F. The Medical Investment Trust**

2 109. Imperium is solely owned by the Medical Investment Trust. CCD Exs.
3 15 and 18.

4 110. Medical Investment Trust bought 50,000 shares of stock in Imperium
5 for \$0.2 cash per share, giving Imperium a total capitalization of \$1,000. CCD Ex.
6 15 at 10-11; CCD Ex. 18.

7 111. The Medical Investment Trust was set up by the doctors, who
8 Mr. Oxman believed, but was not certain, included Counterclaim Defendants Julian
9 and Michael Omid. Nov. 14, 2017 Tr. at 129:22-130:5.

10 112. Ms. Jaroscak testified that one of the individual Omidis – Michael,
11 Julian or Cindy – is a beneficiary of the Medical Investment Trust, although she
12 could not identify which one. Dec. 12, 2017 Tr. at 201:22-202:14.

13 113. As reported to the California Secretary of State in 2017, the address of
14 the Medical Investment Trust is 269 S Beverly Drive, # 1409 Beverly Hills. CCP
15 Ex. 121. This is the same postal box that (1) SCM reported in 2017 as its business
16 address (CCP Ex. 12 at 5); (2) Beverly Hills SC reported in 2013 as the street
17 address of its principal executive office/California office (CCP Ex. 27 at 4);
18 (3) New Life SC reported in 2016 as the street address of its principal executive
19 office/California office (CCP Ex. 28 at 3); (4) Orange Grove SC reported in 2016 as
20 the street address of its principal executive office/California office (CCP Ex. 29 at
21 3); and (5) Valley SC reported in 2014 and 2016 as the street address of its
22 principal executive office/California office (CCP Ex. 37 at 3-4). This is also the
23 listed address in 2014 and 2016 for Shawn Pezeshk, the owner of Golden State and
24 SCM. CCP Exs. 31 at 5 & 32 at 5-6.

25 114. Dr. Au testified that while he believed a trust owned Imperium, he did
26 not know the trust's name and had never heard of the Medical Investment Trust.
27 Nov. 14, 2017 Tr. at 82:5-9. When he was CEO of Imperium, he could not recall
28

1 interacting with anyone on behalf of the trust other than “the lawyers.” *Id.* at 84:5-
2 11.

3 115. Janzen Hidalgo became the trustee for Medical Investment Trust on or
4 about January 2017. CCD Ex. 26; Dec. 19, 2017 Tr. 28:21-29:3.

5 116. Janzen Hidalgo testified that Dr. Au and Maureen Jaroscak asked him
6 to become trustee of the Medical Investment Trust at the same time they asked him
7 to become President of Imperium. Dec. 19, 2017 Tr. at 28:21-29:3. Janzen
8 Hidalgo also believed that Dmitriy Aristov, former counsel of record in this action
9 for certain Counterclaim Defendants, was also present at the meeting. *Id.*

10 117. Janzen Hidalgo views his job as trustee of the Medical Investment
11 Trust and CEO of Imperium as “mostly the same.” Dec. 19, 2017 Tr. at 30:7-13.
12 He testified that his role as trustee was to “make sure the business is going fine.”
13 Dec. 19, 2017 Tr. at 26:24-27:4.

14 118. Janzen Hidalgo does not get paid to be the trustee of the Medical
15 Investment Trust. Dec. 19, 2017 Tr. at 30:14-16. He testified that he took the
16 position to get experience. *Id.*

17 119. Janzen Hidalgo has not seen any documentation explaining the
18 purpose of the Medical Investment Trust. Dec. 19, 2017 Tr. at 27:10-12.

19 120. Janzen Hidalgo could not identify the beneficiaries of the Medical
20 Investment Trust. Dec. 19, 2017 Tr. at 27:18-20.

21 **G. Request for Patient Records for Doctors Affiliated with**
22 **Counterclaim Defendants**

23 121. According to Mr. Oxman, doctors who were previously with IMS have
24 called Imperium to request records for their patients. In response to these requests,
25 Imperium said “sure,” and gave the requested records to the doctors. Nov. 14, 2017
26 Tr. at 38:24-39:6.

27 122. Mr. Oxman testified that, in most cases, Imperium did not charge the
28 doctors for the retrieval or copying of such records and did not identify an instance

1 when Imperium charged a third party to retrieve or copy patient files. Nov. 14,
2 2017 Tr. at 39:7-39:13.

3 123. Doctors who previously provided services for Counterclaim
4 Defendants have also requested patient records from Imperium for litigation
5 purposes, and Imperium has provided the requested records to those doctors.
6 Nov. 14, 2017 Tr. at 39:21-25.

7 **H. Counterclaim Defendants' Use of NexTech in Litigation**

8 124. To prepare the Complaints in the Main Action and in this action,
9 counsel Brittney Whitman spent six to eight months investigating Plaintiffs' claims.
10 This included retrieving information from NexTech and printing out voluminous
11 records from NexTech. Dec. 12, 2017 Tr. at 74:21-75:1, 76:16-20, 82:8-11, 83:15-
12 19. The Complaint in the Main Action contained allegations regarding 411 specific
13 patients.

14 125. SCM, Julian Omid, the Plaintiffs in this case, and other related entities
15 became Counterclaim Defendants pursuant to a United's Counterclaim filed in this
16 action on May 12, 2014. Dkt. 15. This Counterclaim identified seven exemplar
17 United members, only one of which had been identified in either of Plaintiffs' two
18 Complaints.

19 126. Prior to filing its Counterclaim, United served an Answer on April 18,
20 2014, seeking to setoff or recoup amounts it had paid to the Plaintiffs. Dkt. 1.

21 127. SCM and Julian Omid, with the assistance of their counsel
22 (Ms. Whitman), assigned the software license to Imperium effective May 22, 2014.
23 Nov. 14, 2017 Tr. at 177:14-178:20. In connection with the May 22, 2014
24 assignment, SCM/Julian Omid made no provision for a right of access to the
25 information contained on NexTech for purposes of discovery in the two pending
26 lawsuits.

27 128. As discussed below, Counterclaim Defendants used information
28 contained in the NexTech database to seek dismissal of the Counterclaim, propound

1 discovery, respond to discovery, and amend their complaint in the Main Action.

2 129. In response to the First Amended Counterclaim, the Counterclaim
3 Defendants filed a motion to dismiss. In support of the motion, they relied on
4 information from NexTech. Dkt. 55. The motion referenced documents pertaining
5 to seven different patients, which were identified as coming from NexTech. The
6 dates on the documents for certain of the newly-identified patients indicate that they
7 were printed or created in October 2014 – after the assignment of the NexTech
8 license to Imperium. Dkt. 66 at 19, 20.

9 130. In an April 10, 2015 order in the Main Action, the District Judge
10 granted United’s motion to dismiss Plaintiffs’ Complaint but allowed leave to
11 amend. Case No. 14-cv-2139, Dkt. 1396 at 120. In response, Plaintiffs filed a
12 Second Amended Complaint setting forth numerous, additional specific medical
13 procedures they provided, the dates of those procedures, and the specific surgery
14 centers or other providers that provided those services for many of the over 300
15 exemplar patients identified by Plaintiffs.

16 131. Given the additional information contained in the Second Amended
17 Complaint, it is more likely than not that the NexTech database was accessed
18 between April 10, 2015 and June 1, 2015 to secure some of this additional
19 information. It is not credible or reasonable that Ms. Whitman would have
20 anticipated all of the materials needed to plead a Second Amended Complaint or to
21 respond to discovery requests served by Counterclaim Plaintiffs. And the
22 government had seized the documentation printed by Ms. Whitman in the spring of
23 2014. Dec. 12, 2017 Tr. at 119.

24 132. It is also more likely than not that Counterclaim Defendants utilized
25 NexTech in 2015-16 to send hundreds of letters to patients asking them to sign a
26 supplemental assignment of benefits. CCP Ex. 64. Plaintiffs in their Third
27 Amended Complaint in the Main Action filed on February 29, 2016, alleged that
28 they had “recently contacted many of their patients, asking them to sign a follow-up

1 assignment of benefits” and that over 300 patients had returned such assignments.
2 Case No. 14-cv-2139, Dkt. 1749 at ¶ 707.

3 133. Counterclaim Defendants have not presented credible evidence that
4 they had to obtain permission from Imperium to utilize NexTech to print or
5 download information from NexTech for use in this litigation, and no evidence that
6 they had to compensate Imperium for such use. Dr. Au (Imperium’s CEO from
7 August 2015 through the end of 2016) testified that during that period he was not
8 involved in granting any approvals use of NexTech. Nov. 14, 2017 Tr. at 97:6-8.
9 Nor was any evidence presented regarding any such approvals by Mr. Kollars, the
10 first CEO of Imperium. Similarly, Imperium’s current CEO (Janzen Hidalgo)
11 testified that he had not said “no” to requests for discretionary access to documents
12 on the NexTech system by doctors or staff. Dec. 19, 2017 Tr. at 51:5-10.

13 134. Counterclaim Defendant Top Surgeons utilized NexTech for its benefit
14 in a separate lawsuit entitled *Faitro, et al. v. Top Surgeons, Inc., et al.*, Los Angeles
15 Superior Court Case No. BC454464. Top Surgeons asked Ashkan Rajabi, an IT
16 consultant, to determine the identity of all persons who fit the description of class
17 members in *Faitro*. This work required him to use NexTech for six to seven days.
18 Dec. 19, 2017 Tr. at 125:8-127:10. He eventually used the NexTech system to
19 identify over 18,000 patients who were purported class members. *Id.* at 130.

20 135. Mr. Rajabi initially testified that Top Surgeons asked him to perform
21 the analysis and that he did not recall being contacted by anyone at Imperium.
22 Dec. 19, 2017 Tr. 126:24-127-2, 130:23-25. He later changed his testimony, stating
23 he did speak to Dr. Au – then CEO of Imperium – about this as well. *Id.* at 159:18-
24 161:6. The Court finds Mr. Rajabi’s initial testimony more credible, particularly
25 because Dr. Au testified that he (as CEO) was never approached to retrieve old
26 medical records. Nov. 14, 2017 Tr. 97:18-21.

27 136. In or about December 2016, Imperium requested Mark Jubelt, then
28 counsel for the Counterclaim Defendants, to send out collection letters to patients of

1 Counterclaim Defendants, which reflected patient contact information and historical
2 billing information obtained from NexTech for services rendered by Counterclaim
3 Defendants. An example of such letter is CCP Ex. 98, which states, in part, that
4 “[o]ur records show that your balance on the services provided under Orange Grove
5 Surgery Center LLC on the date of services is now \$[].” Counterclaim Defendants
6 also acknowledge that “Imperium requested Mr. Jubelt to provide the services.”
7 Dkt. 562-1 at 6.

8 137. With respect to the uses of NexTech by or for the benefit of
9 Counterclaim Defendants, there is no evidence that Counterclaim Defendants, or
10 anyone on their behalf, had to compensate Imperium for such NexTech use.

11 **I. October 5, 2017 Letter**

12 138. On October 7, 2017, Counterclaim Defendants provided this Court
13 with a copy of a letter dated October 5, 2017 from Janzen Hidalgo to Mark Jubelt
14 and Kamille Dean. Dkt. 544, Ex. 3 to K. Dean Declaration.

15 139. The letter states:

16 You have requested that we provide you with documents relating to
17 the NexTech system and materials which we own and operate
18 concerning medical services rendered by various doctors and surgical
19 facilities since 2009. We have had great difficulty accessing this
20 material, and it involves thousands upon thousands of documents. The
21 burden on our company in attempting to access these documents has
22 been unreasonable and extraordinarily burdensome.

23 Despite our best efforts we cannot provide any further documents
24 without compensation. Our staff charges between \$250 to \$300 per
25 hour for document retrieval services. Our attorneys charge \$500 per
26 hour for retrieval, review, and privilege examination services. We can
27 simply no longer seek to obtain these documents without
28 compensation.

There are hundreds of hours involved in meeting your request.
Because we do not know the costs involved, we will need to make an
assessment of services to be provided. Should you wish a full
assessment we will provide it, and can provide you with a specific

1 breakdown of likely charges for paper and/or electronic production
2 options. However, we anticipate that hundreds of hours of labor will
3 be necessary to satisfy the scope of your request.

4 Please let us know what you wish to do.

5 140. The October 5, 2017 letter does not have a physical signature. Rather,
6 in the signature block it has “Jenzen Hidalgo” typed in italics, which is a
7 misspelling of Janzen Hidalgo. CCD Ex. 9.

8 141. Janzen Hidalgo testified that he typed this letter while on the naval
9 base in San Diego. Mr. Hidalgo testified that he asked his friend on base to review
10 it for him and have him add his name under the letter, which he misspelled.
11 Dec. 19, 2017 Tr. at 52:5-53:24.

12 142. Janzen Hidalgo testified that he wrote this letter in response to a
13 request by Mark Jubelt, former counsel of record for Counterclaim Defendants, for
14 medical records. Dec. 19, 2017 Tr. at 54:5-17. According to Mr. Hidalgo,
15 Mr. Jubelt orally requested to extract from NexTech “thousands and thousands of
16 patient files.” Dec. 19, 2017 Tr. at 54:23-25. Mr. Jubelt did not explain why he
17 needed the files or which specific patients, just that he wanted “all of the
18 information” for thousands of patients. Dec. 19, 2017 Tr. at 55:15-56:12.

19 143. Janzen Hidalgo did not recall ever speaking with Mr. Jubelt prior to
20 this phone call in late September 2017. Dec. 19, 2017 Tr. at 56:16-18.

21 144. Janzen Hidalgo printed out the letter. He traveled to Los Angeles and
22 gave it to his brother Jamie Hidalgo, a day or two later. He asked his brother to
23 deliver it to Mr. Jubelt and Ms. Dean. Dec. 19, 2017 Tr. at 59:23-60:16.

24 145. Janzen Hidalgo’s October 5, 2017 letter was based on the assumption
25 that Imperium was being requested to provide records for “thousands and thousands
26 of patients.” Dec. 19, 2017 Tr. at 59:4-7. He testified that Mr. Jubelt asked him for
27 records of over 3,000 patients. Dec. 19, 2017 Tr. at 90:7-9. It is not clear where
28 this number has come from or which patients are on this list because Counterclaim

1 Plaintiffs' pending discovery did not ask for records of 3,000 patients.

2 146. Mr. Oxman also testified that Imperium had been willing to provide
3 documents and record until it allegedly "became obvious that it was millions of
4 documents." Nov. 14, 2017 Tr. at 48:17-23. Neither Mr. Oxman nor Janzen
5 Hidalgo provided a reasonable or credible basis for the estimate that "millions of
6 documents" were requested by Counterclaim Plaintiffs in discovery.

7 147. Despite writing in the letter that "[w]e have had great difficulty
8 accessing this material" and "[t]he burden on our company in attempting to access
9 these documents has been unreasonable and extraordinarily burdensome," Janzen
10 Hidalgo has not attempted to access the patient records requested by Mr. Jubelt, nor
11 has anyone else at Imperium. Dec. 19, 2017 Tr. at 62:12-64:7.

12 148. Janzen Hidalgo did not look at any legal documents within Imperium
13 regarding Imperium's obligation to provide the requested patient records. Dec. 19,
14 2017 Tr. at 57:5-8.

15 149. While the October 5, 2017 letter states "[o]ur staff charges between
16 \$250 to \$300 per hour for document retrieval services," Janzen Hidalgo testified
17 that he did not recall Imperium charging anyone \$250 to \$300 per hour for
18 document retrieval services. Dec. 19, 2017 Tr. at 64:22-65:4.

19 150. Janzen Hidalgo testified that the estimate for the number of hours
20 involved and the hourly charge of staff referenced in the October 5, 2017 letter was
21 determined at a meeting between himself, Dr. Au and another manager at Royalty
22 named Janice. According to Mr. Hidalgo, either Dr. Au or Janice came up with the
23 estimate for both the number of hours and hourly rate. Mr. Hidalgo could not
24 identify a basis for the hourly rates other than that it is a "hassle . . . to get all of
25 those information." Dec. 19, 2017 Tr. at 66:3-67:3; 69:4-13. Dr. Au did not testify
26 to such a meeting; to the contrary, Dr. Au testified that he did not do more than
27 exchange greetings with Janzen Hidalgo. Nov. 14, 2017 Tr. at 89:2-6.

28 151. The October 5, 2017 letter also states that Imperium's "attorneys

1 charge \$500 per hour for retrieval, review, and privilege examination services.”
2 CCD Ex. 9. Janzen Hidalgo testified that he was referring to Maureen Jaroscak and
3 other “attorneys in the office” that he could not identify by name. Mr. Hidalgo,
4 however, testified at the hearing that Imperium does not pay these attorneys or any
5 other entity for the time of these attorneys. Dec. 19, 2017 Tr. at 67:9-69:3.

6 152. Neither Mr. Jubelt nor Ms. Dean has requested a “full assessment of
7 services to be provided” as referenced in the October 5, 2017 letter. CCD Ex. 9;
8 Dec. 19, 2017 Tr. at 69:14-70:6. Any further “assessment” has not been done. *Id.*

9 153. Janzen Hidalgo’s testimony about his conversations with Dr. Au
10 regarding the statements in the October 5, 2017 letter is not credible and
11 inconsistent with Dr. Au’s testimony that he has not spoken to Mr. Hidalgo since he
12 took over as CEO of Imperium other than an occasional greeting in the office or
13 over the phone.

14 154. Janzen Hidalgo testified that he did not recall having any
15 conversations with Brian Oxman about the request for patient records from
16 Mr. Jubelt. Dec. 19, 2017 Tr. at 63:19-25. This contradicts Mr. Oxman’s
17 testimony that they met at a hotel to discuss the request. Dec. 12, 2017 Tr. at 63-
18 15-64:11.

19 155. Based on the inconsistencies in testimony discussed above, the
20 misspelling of the author’s name and the Court’s observation of Janzen Hidalgo’s
21 demeanor, as well as a comparison of his testimony with the language used in the
22 letter, the Court finds it not credible that Janzen Hidalgo drafted the letter on his
23 own. Rather, it is more likely than not that a lawyer or someone else working on
24 behalf of Counterclaim Defendants drafted the letter.

25 156. Both Janzen Hidalgo and Brian Oxman testified about the supposed
26 length of time that it takes to retrieve and print patient records. Janzen Hidalgo
27 testified that it only takes a couple of minutes to pull up a patient’s records, which
28 is searchable by patient name, but it would take a “long time” to print, estimating

1 that it would take 30 minutes to print 20 pages of patient notes. Dec. 19, 2017 Tr.
2 at 44:2-46:7. He attributed the lengthy print time to the fact that Imperium has slow
3 or non-functioning printers. *Id.* at 46:15-22. Mr. Oxman testified that it takes
4 “anywhere from an hour or more depending on who the patient is, and sometimes
5 it’s take as long as three or four hours just to identify all of the information
6 regarding one patient, because you’ve got to look at all the different sectors.
7 Nov. 14, 2017 Tr. at 151:17-24. Mr. Oxman, however, has never actually used the
8 NexTech system. In addition, his testimony is inconsistent with the testimony of
9 Ashkan Rajabi, Counterclaim Defendants’ IT consultant who testified that pulling
10 up a patient’s records “is quick.” Dec. 19, 2017 Tr. at 137:14-19.

11 157. The burden alleged by Imperium was also based on the unsupported
12 assumption that United was requesting all patient records for 3,000 patients and that
13 the requests were for “millions of documents,” as asserted by Mr. Oxman
14 (Nov. 14, 2017 Tr. at 48:17-23). In addition, the testimony by Janzen Hidalgo,
15 Brian Oxman and Dr. Au regarding the cost estimate contains unreasonable and/or
16 unsupported assumptions. United’s first set of document requests seek documents
17 relating to only 88 patients. Dkt. 441-4. Subsequent requests relate to discrete
18 subsets of patients, and discrete categories of documents, for example, patient
19 notes. Much of the claimed burden also arises from unsupported calculations of
20 time allegedly required to pull up and print the entirety of a patient record,
21 including use of slow or non-working printers. According to Counterclaim
22 Defendants, even a short set of patient notes from NexTech is a burden to print.

23 158. The Court finds the assertions of burden put forth by Counterclaim
24 Defendants and Imperium to be unreasonable, unsupported and incredible.

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II. CONCLUSIONS OF LAW¹

A. Counterclaim Defendants had a duty to preserve and not hinder access to evidence on NexTech

1. “A litigant has a duty to preserve evidence it knows or should know is relevant to imminent litigation.” *Cyntegra, Inc. v. Idexx Labs., Inc.*, 2007 U.S. Dist. LEXIS 97417, at *7 (C.D. Cal. Sept. 21, 2007). Here, Counterclaim Defendants had a duty to preserve medical records and other information available on the NexTech system. Counterclaim Defendants knew that the NexTech database contained evidence relevant to the two lawsuits filed in March of 2014, before the purported assignment of the NexTech license to Imperium in May of 2014, and before the purported sale and transfer of patient records by way of Assignment and Assumption Agreement in July 2014.

2. Litigants also have a duty not to hinder their opponents’ access to relevant information by making it more difficult or costly to obtain. *See, e.g., Treppel v. Biovail Corp.*, 233 F.R.D. 363, 372 n.4 (S.D.N.Y. 2006) (“conduct that hinders access to relevant information is sanctionable, even if it does not result in the loss or destruction of evidence. *See Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99, 110 (2d Cir. 2002)”).

B. Counterclaim Defendants have possession, custody, or control over the data on NexTech

3. Rule 34 requires parties to produce responsive documents within their “possession, custody, or control.” Fed. R. Civ. P. 34(a)(1). A party need not have “actual possession of the requested document” to be obligated to produce it. *Soto v. City of Concord*, 162 F.R.D. 603, 619 (N.D. Cal. 1995). Rather, “control” is sufficient. *See In re Citric Acid Litig.*, 191 F.3d 1090, 1107 (9th Cir. 1999); *Thales*

¹ Any of the following conclusions of law which may be determined to be finding of facts are hereby deemed findings of fact.

1 *Avionics Inc. v. Matsushita Avionics Sys. Corp.*, 2006 U.S. Dist. LEXIS 97119, at
2 *10 (C.D. Cal. Mar. 8, 2006). Control may extend to documents that are nominally
3 held in another corporation's care, including, for example, when stored with a sister
4 corporation or other unrelated entity, because of that entity's "complicity in storing
5 or withholding documents." *Uniden Am. Corp. v. Ericsson Inc.*, 181 F.R.D. 302,
6 306 (M.D.N.C. 1998). Accordingly, under Rule 34, courts are to "closely examine
7 the actual relationship between two corporations" when one is a party and the other
8 a non-party with claimed control of responsive documents, in order to "guard
9 against not just fraud and deceit, but also sharp practices, inequitable conduct, or
10 other false and misleading actions whereby corporations try to hide documents or
11 make discovery of them difficult." *Uniden*, 181 F.R.D. at 306 (citing *Societe*
12 *Internationale v. Rogers*, 357 U.S. 197, 204 (1958)).

13 4. "[C]ourts have also found that one corporation controls another in the
14 situation where one is the alter ego of the other corporation." *Uniden*, 181 F.R.D.
15 at 305 (citing *Afros S.P.A. v. Krauss-Maffei Corp.*, 113 F.R.D. 127, 130 (D. Del.
16 1986) (collecting cases)); *see also Thales Avionics*, 2006 U.S. Dist. LEXIS 97119,
17 at *10. In these situations, "the court credits substance over form and ignores the
18 separate corporate entities in order to protect against fraud and deceit." *Uniden*,
19 181 F.R.D. at 305. Moreover, alter ego for purposes of "Rule 34 includes situations
20 well beyond those which would permit a finding of *in personam* jurisdiction or
21 liability based on an alter ego situation." *Id.* at 306.

22 5. Alter ego determinations can depend on a variety of non-exhaustive
23 factors, including the transfer of assets by non-arm's length transactions, which is
24 an example of the "inequitable conduct" discussed in *Uniden*. *See, e.g., Kayne v.*
25 *Ho*, 2012 U.S. Dist. LEXIS 192916, at *27 (C.D. Cal. Sept. 6, 2012) (listing
26 numerous factors, including "the failure to maintain arm's length relationships," as
27 relevant to alter-ego determinations). Similarly, whether a transaction was
28 conducted at arm's length may depend on "the totality of the circumstances." *Cf.*,

1 *e.g.*, *Kachatryan v. Martirosian (In re Martirosian)*, 2017 Bankr. LEXIS 680, at *9,
2 *12-21 (Bankr. C.D. Cal. Mar. 14, 2017) (noting “myriad” facts and circumstances,
3 including a corporation’s registered address, as supporting a finding that a property
4 sale “was not an arm’s length transaction, but instead part of a scheme to hinder,
5 delay and/or defraud creditors”).

6 6. Here, the principal transactions at issue – SCM’s assignment of the
7 NexTech license to Imperium and SCM’s and Golden State’s transfer and sale of
8 patient records and other records and materials to Imperium – did not take place at
9 arm’s length. For example, while representing SCM in connection with the May
10 2014 assignment, Ms. Jaroscak drafted the Assignment on behalf of SCM and
11 executed the assignment on behalf of Imperium as a Manager. *See* Nov. 14, 2017
12 Tr. 177:8-178:20; Dec. 12, 2017 Tr. at 183:2-185:15; CCD Ex. 5. Similarly, the
13 outside counsel involved with the transaction – Sheppard Mullin – reviewed the
14 agreement on behalf of SCM interests, but also had an attorney-client relationship
15 with Imperium. Dec. 12, 2017 Tr. at 209:4-210:9. Mr. Kollars also signed the
16 July 1, 2014 Assignment and Assumption Agreement on behalf of Imperium as
17 Assignee, while simultaneously serving as CEO of Assignor Golden State., where
18 he was responsible for the management of Counterclaim Defendant surgery centers.
19 Nor was there credible evidence of any arm’s-length negotiation or bargaining
20 before the assignment to Imperium.

21 7. Other factors that courts consider to “determine when documents in
22 the possession of one corporation may be deemed under control of another
23 corporation,” include, but are not limited to, the following: (i) commonality of
24 ownership; (ii) exchange or intermingling of directors, officers or employees of the
25 two corporations; (iii) exchange of documents between the corporations in the
26 ordinary course of business; and (iv) involvement of the non-party corporation in
27 the litigation. *Uniden*, 181 F.R.D. at 306; *Thales Avionics*, 2006 U.S. Dist. LEXIS
28 97119, at *13-16. Additional factors include: employing the same attorneys, *see*

1 *Tri-State Equip. v. United States*, 1997 U.S. Dist. LEXIS 6281, at *24 n.6 (E.D.
2 Cal. Apr. 17, 1997); or entities that are “controlled, dominated, managed, and
3 operated by [a single family],” *see Riddle v. Leuschner*, 51 Cal.2d 574, 581 (1959).
4 Each of these factors weighs in favor of a finding for purposes of this discovery
5 dispute that Imperium is an alter ego – or should be deemed to be under the control
6 – of one or more Counterclaim Defendants.

7 8. Counterclaim Defendants argue that there is no evidence of unity of
8 ownership between Imperium (which is owned by the Medical Investment Trust)
9 and any Counterclaim Defendants. That is not true. As an initial matter, the
10 April 24, 2015 letter from Ms. Jaroscak, counsel for SCM and Imperium, to
11 NexTech, evidences a unity of interest: “I represent Imperium, formerly Surgery
12 Center Management.” CCD Ex. 6. Mr. Oxman claimed this letter was a mistake
13 by Ms. Jaroscak’s colleague, but Ms. Jaroscak testified that she assumed she
14 followed her routine practice in reviewing this letter before it was sent out over her
15 name. Dec. 12, 2017 Tr. at 208: 6-9. With regard to unity of ownership/interest,
16 Ms. Jaroscak also testified that at least one of the beneficiaries of the Medical
17 Investment Trust, which are the equitable owners thereof, is Julian, Michael, or
18 Cindy Omid. *See* Dec. 12, 2017 Tr. at 201:22-202:5. Michael and Julian Omid
19 also owned Beverly Hills SC (Dkt. 51-1 at 37), and likely owned other surgery
20 centers that they organized and incorporated (CCP Exs. 25, 30, 33, 37, 38), and also
21 SCM, which is currently owned by Mr. Pezeshk, their uncle and Cindy Omid’s
22 brother. Nov. 14, 2017 Tr. at 26:11-16.

23 9. Moreover, there has been substantial overlap and intermingling among
24 the personnel of Imperium (and its managed entities), and the personnel of
25 Counterclaim Defendants. For example, Timothy Kollars, CEO of Imperium from
26 early 2014 through approximately August 2015, was the CEO “of the various
27 surgery centers and doctors’ group identified in the complaint in *Faitro v. Top*
28 *Surgeons, LLC*,” including Counterclaim Defendants Almont ASC, Beverly Hills

1 SC, New Life SC, Woodlake ASC, and Top Surgeons. CCP Ex. 16, Ex. E (Kollars
2 Decl.). In addition, Mr. Kollars was CEO of Golden State, which managed
3 Counterclaim Defendants, including Beverly Hills SC, New Life SC, IMS and
4 Valley SC. As a result, he was simultaneously managing the Counterclaim
5 Defendants and Imperium. Similarly, Dr. Au was first a physician at IMS and
6 Medical Director for SCM, then a physician at Salus (managed by Imperium) and
7 then CEO of Imperium.

8 10. There has also been substantial overlap of the locations of Imperium
9 (and its managed entities) and those of Counterclaim Defendants. Imperium and its
10 staffing company Augustus Health told the federal government that each of their
11 addresses is 9100 Wilshire Blvd., Suite 800E, Beverly Hills (CCP Ex. 5), which
12 was also the address of Counterclaim Defendants SCM. CCP Exs. 3 at 7 & 83 at 2.
13 Ms. Jaroscak, counsel for SCM and Imperium, also had offices at this same
14 address. CCD Ex. 6 & Dec. 12, 2017 Tr. at 195: 2-4. Medical Investment Trust
15 (sole shareholder of Imperium) has an address (CCP Ex. 121) that is the same
16 postal box used by Counterclaim Defendants SCM (CCP Ex. 12 at 5), Beverly Hills
17 SC (CCP Ex. 27 at 4), New Life SC (CCP Ex. 28 at 3), Orange Grove SC (CCP Ex.
18 29 at 3), and Valley SC (CCP Ex. 37 at 3-4). Finally, Royalty and Salus
19 (Imperium's managed entities) operate, rent free, at the surgery center that was
20 formerly Orange Grove SC, and which Orange Grove SC continues to own.
21 Nov. 14, 2017 Tr. 120:7-22.

22 11. The evidence also shows, as detailed in the findings of fact above, that
23 in the course of Imperium's business, Counterclaim Defendants have had access
24 after the May 2014 Assignment to use NexTech as it benefitted them in this and
25 other litigation. Imperium also allows access to billing and patient records located
26 in the NexTech database to or for the benefits Counterclaim Defendants – without
27 charge – for the purpose of billing patients (CCP Ex. 98) or for “patient continuity.”
28 CCD Ex. 8 at Section 5. And Counterclaim Defendant Michael Omid has access

1 to NexTech in the ordinary course of business, and no restrictions have been
2 imposed by Imperium on his use. Dec. 19, 2017 Tr. at 49:20-51:10. Thus,
3 Counterclaim Defendants have been permitted to use NexTech when it is in their
4 interest to do so. Counterclaim Defendants cannot, in good faith, take the position
5 that information is in their “control” when it helps their interests, but not when
6 Counterclaim Plaintiffs are seeking relevant information in discovery. This tactic is
7 an example of a “sharp” or inequitable practice that courts must guard against in
8 determining the issue of “control” in the discovery context.

9 12. For purposes of this discovery issue, the Court finds that Imperium is a
10 shell or sham company, whose alleged corporate separateness may be disregarded
11 under alter ego factors. Imperium has no employees, no revenue, and no costs that
12 are material. There is no evidence that it regularly generates financial statements or
13 that it files tax returns. Its former CEO, Dr. Au, testified that Imperium’s business
14 function is to “manage” Salus Medical and Royalty Surgical, but when asked what
15 that entails, Dr. Au said, “I’m not sure.” Nov. 14, 2017 Tr. 85:6-11. As CEO of
16 Imperium, he “answered to the lawyers,” who were also lawyers for Counterclaim
17 Defendants. Nov. 14, 2017 Tr. at 82:10-15, 60:9-63:11.

18 13. The conclusion that Imperium is a shell or sham company is also
19 strongly supported by the testimony of Janzen Hidalgo, its current CEO. In early
20 2017, Mr. Hidalgo began as Imperium’s CEO, Secretary, Treasurer and sole Board
21 member. Up to that time, Mr. Hidalgo’s total business training and experience
22 amounted to six months as an accounting assistant. He was asked to do these jobs
23 (as well as to be the sole Trustee of the Medical Investment Trust – owner of
24 Imperium) by “lawyers” all of whom also represent Counterclaim Defendants.
25 Mr. Hidalgo is a full-time, active duty seaman in the U.S. Navy – stationed in
26 San Diego, California. He typically works from sun up to sun down in his position
27 in the Navy. He devotes only 3 hours per month to his duties as CEO, Secretary,
28 Treasurer, and Board member at Imperium. And Imperium has no other

1 employees. Janzen Hidalgo has spent only 30 minutes learning about the NexTech
2 system. He knows nothing regarding Imperium's assets, liabilities or documents.
3 He is paid \$2,500 per month by Imperium to review two pages of financial
4 information associated with other companies that Imperium is supposed to manage.
5 As discussed above in the findings of fact, Mr. Hidalgo is merely a figurehead in
6 his positions at Imperium without substantial activities or responsibilities, and
7 nothing regarding his selection, positions, duties, work or compensation at
8 Imperium and Medical Investment Trust indicates functioning entities.

9 14. Courts have found a party to have control over another entity's records
10 based on evidence of commonality of interest between the two entities. *See Super*
11 *Film of Am., Inc. v. UCB Films, Inc.*, 219 F.R.D. 649, 655 (D. Kan. 2004). In
12 *Super Film*, two entities did not share ownership or have a parent/subsidiary
13 relationship, but they exchanged information, documents and employees. *Id.* In
14 those circumstances, the court found that the moving party "sufficiently
15 demonstrated a *commonality of interest*" between the two entities to impute control
16 over the documents. *Id.* at 655 (emphasis added). In *Uniden*, the court similarly
17 found that documents regularly exchanged (and requests not refused) "in the
18 ordinary course of business" counseled in favor of a Rule 34 alter ego finding. 181
19 F.R.D. at 307. As in these cases, Imperium routinely provided access without
20 charge to the NexTech system to various Counterclaim Defendants, did not reject
21 requests from Counterclaim Defendants, and in numerous other ways demonstrated
22 a commonality of interest with Counterclaim Defendants, as set forth in the
23 findings of fact above.

24 15. The cases cited by Counterclaim Defendants hold that piercing the
25 corporate veil can be difficult when imposing liability or when finding personal
26 jurisdiction. *See, e.g., Eclectic Props. East, LLC v. Marcus & Millichap Co.*, 2010
27 U.S. Dist. LEXIS 7381 (N.D. Cal. Jan. 29, 2010); *Hammond v. Monarch Invs.,*
28 *LLC*, 2010 U.S. Dist. LEXIS 66595 (S.D. Cal. July 2, 2010). But this is not the

1 issue now. The Court is currently considering only whether Imperium is an alter
2 ego of the Counterclaim Defendants for purposes of discovery. The necessary
3 showing for this purpose is substantially lower than that required for an alter-ego
4 finding on the merits. *See Uniden*, 181 F.R.D. at 306 (“The definition of control
5 under Rule 34 includes situations well beyond those which would permit a finding
6 of *in personam* jurisdiction or liability based on an alter ego situation.”).

7 16. Counterclaim Defendants and Imperium have not rebutted the
8 showings made by Counterclaim Plaintiffs regarding control and alter-ego factors.
9 Their proposed findings of fact rely heavily on the testimony of Mr. Oxman. As
10 discussed in the findings of fact above, the Court has found that Mr. Oxman’s
11 testimony lacks credibility and was often based on second-hand information from
12 his role as a litigation coordinator. Besides the Oxman testimony, Counterclaim
13 Defendants rely mainly on documents reflecting board meetings, assignments and
14 other transactions, as well as the purported actions of the figurehead CEOs (Dr. Au
15 and Janzen Hidalgo). Those records have been discussed above, and most reflect
16 only paper transactions – involving an undercapitalized company, directed by
17 counsel for Counterclaim Defendants and lacking functioning officers, employees,
18 board members, revenues, costs, tax returns or other real substance. The existence
19 of these paper records, in the face of substantial real-world evidence to the contrary,
20 does not establish Imperium as a separate entity beyond control of Counterclaim
21 Defendants. Instead, Counterclaim Defendants – through the instructions and
22 directions of their counsel – have used and controlled Imperium to improperly
23 hinder the progress of discovery in this case. Counterclaim Defendants and
24 Imperium have also presented inflated estimates of the time and expense that would
25 have to be incurred to use the NexTech database in response to Counterclaim
26 Plaintiffs’ requests, again in an improper hindrance of discovery.²

27 ² The Court has considered objections (ECF No. 722) by Counterclaim Defendants
28 to certain evidence cited in the proposed findings of fact submitted by Counterclaim

III. ORDER

For purposes of this discovery dispute only, the Court finds (i) that Imperium is an alter ego of one or more of the Counterclaim Defendants, (ii) that Imperium is within the control of the Counterclaim Defendants, (iii) that Counterclaim Defendants have control of the NexTech database, (iv) that Counterclaim Defendants have improperly used and controlled Imperium to hinder the progress of discovery in this case, and (v) that Counterclaim Defendants have a duty to preserve documents in the NexTech database while this litigation is pending. Accordingly, Counterclaim Defendants shall produce records from the NexTech database in response to Counterclaim Plaintiffs' first request for documents. Counterclaim Defendants shall also use the NexTech database as needed to prepare complete substantive responses to Counterclaim Plaintiffs' first set of interrogatories.

DATED: 3/2/2018



ALEXANDER F. MacKINNON
UNITED STATES MAGISTRATE JUDGE

Plaintiffs. To the extent, the Court has cited herein any of the challenged evidence, the objections to that evidence are overruled. The remaining objections are denied as moot.